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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Great American Products, Inc.

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Serial No.76605638

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Myron Amer of Myron Amer, P.C. for Great American Products, Inc.

Mark Rademacher, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Seeherman, Hairston and Grendel, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Great American Products, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register MASTER CELL PROTECTOR as a trademark for "dietary supplement, namely, high potency anti-oxidant formula with collagen and elastin biofactors."[1]

[1] Application Serial No. 76605638, filed August 4, 2004, asserting first use and first use in commerce on August 27, 1996.

Registration has been refused on two bases: (1) Applicant's mark so resembles the mark CELL PROTECTOR, previously registered on the Principal Register for "food supplements in tablet, capsule, powder and liquid form[2] that, as used on applicant's goods, it is likely to cause confusion or mistake or to deceive (Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d)); and (2) Applicant's identification of goods is unacceptable because applicant has included a registered mark in that identification and used it in a generic manner.

The appeal has been fully briefed. Applicant did not request an oral hearing.

We turn first to the refusal based on the asserted likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See

[2] Registration No. 2090712, issued August 26, 1997; Section 8 & 15 affidavits accepted and acknowledged.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the goods, applicant has identified its goods as a specific type of dietary supplement, namely, a high potency anti-oxidant formula with collagen and elastin biofactors. The identification in the cited registration is for food supplements. The Examining Attorney has submitted Internet evidence which shows that food supplements can include antioxidants. See, for example, the advertisement for Super Antioxidant Greens Food Supplement, having the description that the "food supplement is a rich natural source of powerful antioxidants and important vitamins & minerals" www.vitaminstohealth.com/green-food-supplement.html; and the advertisement for GVI Acai, listed as a "Natural Antioxidant Food Supplement," www.discoverhealthand wealth.com/antioxidant-food-supplement.html.
Because the goods are broadly defined in the registration, the identified food supplements must be deemed to include the more specifically identified antioxidant formula that is described in applicant's identification.

During the course of prosecution and in its appeal brief, applicant took the position that there is a distinction between applicant's goods and those of the registrant. In its response to the first Office action, filed August 1, 2005, applicant stated that "Applicant's supplement, in the singular is specifically identified, and is not demonstrated on the record to be one of the plural supplements of the [cited] registration." Applicant appears to argue that because there is no evidence of record that the registrant actually sold supplements having the antioxidants and other ingredients listed in applicant's identification, the goods are different. Applicant seems to have continued to assert this position in its reply brief, by stating that it has avoided conflict with the registrant by including "high potency anti-oxidant formula with collagen and elastin biofactors" in its identification," p. 1, presumably contending that because applicant's goods are an anti-oxidant with certain particular ingredients, the goods are different from those covered by registrant's identification, which does not specify these ingredients. However, this argument ignores the well-established principle that the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or

services recited in an applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A., 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In response to the second Office action, and again in its appeal brief, applicant has taken the position that a dietary supplement is not a food supplement, while the Examining Attorney asserts that it is. Both applicant and the Examining Attorney have submitted dictionary definitions in support of their respective positions.[3] We note, though, that applicant has not explained how a dietary supplement differs from a food supplement; it has only stated that the definition of the word "dietary" "excludes a public perception of a 'food'", brief, p. 2, apparently because the dictionary definition "of or pertaining to diet" "could be restricting food intake,

[3] We grant the Examining Attorney's request that we take judicial notice of the dictionary definitions of "food," "dietary," "supplement" and "master," submitted with the Examining Attorney's appeal brief. The Board may take judicial notice of dictionary definitions. University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

including and [sic] probably registrant's 'food supplements'." Response filed December 15, 2005.[4]

The "Glossary of Biotechnology and Genetic Engineering" defines "dietary supplement" as "food product ingested to correct a perceived deficit in the overall diet; typically not a whole food." Based on this definition, a "dietary supplement" would appear to be a type of food supplement, or at least that some dietary supplements would also be food supplements, and vice versa. The Examining Attorney has also submitted excerpts taken from the NEXIS database in which "dietary supplement" is used interchangeably with "food supplement" or as part of the same category of products, including the following:

> Whether categorized as dietary supplements, natural health products or food supplements, these products are variously regulated....
> "Nutraceuticals World," October 2003
>
> ...International Alliance of Dietary/Food Supplement Associations (IADSA), a collaboration of dietary

[4] In its appeal brief, as part of its argument that the Examining Attorney has not shown that "food supplements" and "dietary supplements" are the same, applicant has asserted that "dietary supplements" is "a two-word combination coined by applicant and, as such, is part of the source-identifying functioning of applicant's mark." p. 2. This assertion is clearly contradicted by the evidence of record, not least of which is applicant's own use of "dietary supplement" as a generic term in its identification of its goods and on its labeling ("All Natural Dietary Supplement"), as well as the use of this term in third-party registrations, articles and a reference work.

> supplement industry trade associations....
> "Better Nutrition," October 1, 2002
>
> Like other dietary supplements, federal regulation of soy foods and supplements is feeble.
> "Wisconsin State Journal," August 11, 2002
>
> ...definition, role and regulation of dietary supplements, noting that the Food Supplement Directive covering vitamins and...
> "Nutraceuticals International," May 2004

Based on the foregoing, as well as the common meanings of the terms "food supplement" and "dietary supplement," both of which terms indicate a product that supplements one's food or diet, we question whether the average consumer would understand that there is any difference between a product called a food supplement and a product called a dietary supplement. Certainly we do not have any evidence before us which clearly articulates what the difference is, or why the trade may view these items differently. Applicant's suggestion that a "dietary supplement" may indicate a restriction in food intake is based on its assertion that the word "dietary" is defined as of or pertaining to diet."[5]. This definition of

[5] Applicant has not submitted a copy of this definition, which is asserted to be from RANDOMHOUSE WEBSTER's [sic] College Dictionary. However, the Examining Attorney submitted a similar

"dietary," which refers to diet in general, and not to "a diet," would not be viewed as restricting food intake, but merely to one's food regimen. And this is the likely meaning of the word "dietary" when it is combined with "supplement" to form the term "dietary supplement." Accordingly, we do not find applicant's argument to be persuasive.

We note that the Examining Attorney has submitted third-party registrations in which a single registration has listed both "food supplements" and "dietary supplements." See, for example, Registration No. 2403139; Registration No. 2956760; and Registration No. 2953349. It is not clear from their inclusion of both products in a single registration whether the registrants were trying to list various terms which could apply to their products, or whether they consider that there is a distinction between food supplements and dietary supplements. Because of this question, in rendering our decision herein, we have not treated applicant's and the registrant's goods as being identical. That being said, though, we find them to be so closely related that they are virtually identical, and certainly extremely closely related. Both products have

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definition, taken from The American Heritage Dictionary of the English Language, 4th ed.: "of or relating to diet."

the same purpose—to supplement deficiencies in the diet. As noted, we believe that consumers will regard both food supplements and dietary supplements as being essentially the same type of product, and the definition in the "Glossary of Biotechnology and Genetic Engineering" bears this out. Further, the third-party registrations which list both food supplements and dietary supplements in the identifications indicate that they are products which may emanate from a single source and be sold under a single mark. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

The evidence also shows that the channels of trade for food supplements and dietary supplements are the same. The Examining Attorney has submitted materials from websites showing the sale of antioxidants and various food supplements. See, for example, the website for Nutrition Express, which lists, as subcategories for Lindberg brand products, "Multiple Vitamins & Minerals," Antioxidants," and "Bee Pollen," as well as such specific products as "Ultimate Antioxidant," "Natural Whey Vanilla Pwd" [sic] and "Diet Support w/Green Tea." Applicant points out that none of the website evidence shows sales of antioxidants that are specifically advertised as containing collagen and elastin biofactors. Although this is correct, it does not

detract from the persuasive value of the evidence that items of this type are sold in the same channels of trade.[6] Moreover, it is common knowledge that food supplements and dietary supplements are sold in such venues as health food stores and drug stores. Aside from its assertion that the Examining Attorney has failed to provide proof "that applicant's specifically described goods, as aforesaid, move in the same channels of trade as the goods of the registrant," reply brief, p. 2, applicant has not stated in what channels of trade its goods are sold, or given any reason why goods of the type identified in its application would not be sold in health food stores and drugstores.

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, the marks are also virtually the same. Applicant has added the word MASTER to the registered mark, CELL PROTECTOR. This additional word does not serve to distinguish the marks. The words CELL PROTECTOR, which are identical in appearance

[6] We also note that, as discussed infra, applicant's identification includes a registered trademark. We would not expect third parties to misuse a registered mark by referring to it as a generic ingredient in their antioxidant products.

and sound to the cited mark, still have a noted presence in applicant's mark. The connotation of the marks is also similar. The word MASTER, as used in applicant's mark, will be regarded as an adjective modifying "cell protector." The adjectival form of this word is defined as, inter alia, "principal or predominant," "controlling all other parts of a mechanism," and "highly skilled or proficient." Under any of these definitions, CELL PROTECTOR in applicant's mark still retains its meaning of a product that protects cells, the same meaning that the registered mark has. The word MASTER, when used with CELL PROTECTOR, may suggest that the product is "proficient" at protecting cells, or that it protects a "predominant" or "controlling" type of cell, but the meaning of protection for the cell remains. The marks are, thus, similar in appearance, pronunciation and connotation, and CELL PROTECTOR and MASTER CELL PROTECTOR convey the same commercial impression.

Thus, the du Pont factors of the similarity of the marks, similarity of the goods, and channels of trade all favor a finding of likelihood of confusion. The only other factor that has been discussed by applicant and the Examining Attorney, and on which there is any evidence, is the conditions under which and the buyers to whom sales are

made. There being no restrictions in the identifications as to channels of trade, the buyers must be deemed to be the public at large, and as such they cannot be considered to be particularly sophisticated about these goods. The Examining Attorney has pointed out that dietary supplements and food supplements, as shown by the website materials, are rather inexpensive, with prices generally ranging from ten to twenty dollars per bottle. Applicant asserts that "it is known from common experience that shoppers read labels and labeled products are placed on shelves at the point of sale to accommodate this practice." Reply brief, p. 2. If applicant is attempting to assert, by this statement, that consumers of these products are careful, we are not persuaded by this argument. Even careful purchasers who note that applicant's mark contains the word MASTER are likely to believe that MASTER CELL PROTECTOR and CELL PROTECTOR, used for such similar goods as dietary supplements and food supplements, are variant forms of the same mark, and they indicate goods emanating from a single source. We also point out that food supplements and dietary supplements may be recommended by word of mouth. In such circumstances a consumer, who has been told of a food supplement called CELL PROTECTOR, and later sees MASTER CELL PROTECTOR dietary supplement on a store shelf,

may believe that this is the product that had been recommended to him. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

Accordingly, the refusal under Section 2(d), on the ground of likelihood of confusion, is affirmed.

The second basis for refusal is that applicant's identification of goods is unacceptable because it includes a registered mark, used as a generic term. The identification indicates that applicant's dietary supplement includes "elastin biofactors." The Examining Attorney has submitted a copy of a third-party registration which shows that BIOFACTORS is a registered mark for "chemicals used in the manufacture of cosmetics, pharmaceuticals for humans and veterinary pharmaceuticals."[7]

Applicant argues that the identification is acceptable despite the inclusion of this registered mark because there is no evidence that the public knows it is a registered trademark; that applicant has combined the meanings of "bio" and "factors" to make a generic term; and has used

[7] Registration No. 2495331, issued October 9, 2001.

"biofactors" in a generic sense on its label and should be allowed to describe its goods in its trademark application as it is used on its label.

We are not persuaded by applicant's arguments. Although applicant has stated that "biofactors" is a generic term, its very statement shows that applicant has "created" this word, and that it is not a recognized generic term. More importantly, because BIOFACTORS is the subject of a trademark registration, it is entitled to all the presumptions provided by Section 7(b) of the Trademark Act; applicant may not attack the registration in this fashion in this ex parte proceeding, by claiming that the mark is generic and attempting to treat it as generic. If applicant believes that BIOFACTORS has become a generic term, applicant's recourse is to bring a cancellation action against the registration. However, as long as BIOFACTORS is registered, applicant may not use it as a generic term in its identification. See Section 1402.09 of the Trademark Manual of Examining Procedure (4th ed., rev. April 2005). Accordingly, the requirement for an acceptable identification of goods is affirmed.

Decision: The refusals of registration on the basis that applicant's mark is likely to cause confusion, and on

the basis that the identification of goods is unacceptable, are affirmed.